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Statutory Amendments--Grounds for Divorce

J. C. W. Jr.

West Virginia University College of Law

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as far as the imagination could be stretched. However, little could be concluded therefrom more than ancient truth that the law is a human thing and cannot be expected to anticipate each and every vicissitude and predicament in the affairs of men. Surely, as evidenced by the great preponderance of wills that leave all or a large part of the testator's estate to his spouse, a law that is partial to a surviving spouse over the decedent's parents or brothers or sisters will more often accommodate his wishes than one that will work a contrary result. And in all those cases where this will not be so, the remedy is only so far away as are the materials required to draft a valid will.

J. E. D., Jr.

STATUTORY AMENDMENTS—GROUNDS FOR DIVORCE.—In the 1957 session our legislature amended the statutory provision concerning grounds for divorce. W. VA. CODE c. 48, art. 2, § 4 (Michie 1955). Specifically, subsection (c) pertaining to the desertion period, and subsection (d) pertaining to cruel and inhuman treatment were amended. The desertion period was reduced from two years to one year. This change is clear enough. As to the provision concerning cruel and inhuman treatment, the change is not so apparent.

The subsection dealing with cruel and inhuman treatment, as incorporated in W. VA. CODE c. 48, art. 2, § 4 (Michie Supp. 1957), is: "A divorce from the bond of matrimony may be decreed: . . . (d) For cruel and inhuman treatment, or reasonable apprehension of bodily hurt, and a charge of prostitution made by the husband against the wife shall be deemed cruel and inhuman treatment within the meaning of this paragraph; cruel and inhuman treatment shall also be deemed to exist when the treatment by one spouse of another, or the conduct thereof, is such as to destroy or tend to destroy the mental or physical well being, happiness and welfare of the other and render continued cohabitation unsafe or unendurable."

The first clause of the provision is the same as the prior provision except that the word "falsely" concerning a false charge of prostitution is omitted in the amended version. Why this word was omitted is not apparent. Even though the charge of prostitution falsely made was a statutory exception not requiring proof of mental suffering, the court has held that whether similar accusations of adultery will amount to cruel and inhuman treatment depends upon

the effect produced or likely to be produced upon the mind or health of the accused. *Maxwell v. Maxwell*, 67 W. Va. 414, 71 S.E. 571 (1911). If the evil results do not follow, or are unlikely to follow, they will not amount to cruel and inhuman treatment giving cause for divorce. *Maxwell v. Maxwell*, *supra*. Certainly, accusations unless falsely made would not result in such evil. If the accusations were true the accused may well experience shame but it is doubtful that such would impair or destroy her peace of mind.

In *Boos v. Boos*, 93 W. Va. 727, 117 S.E. 616 (1923), the court said that a charge of prostitution by the husband against his wife falsely is equivalent to cruel treatment. It is also said that cruel and inhuman treatment is, like negligence, a relative term, and of necessity must depend upon the circumstances of each particular case. *White v. White*, 106 W. Va. 681, 146 S.E. 720 (1929). Apparently, this restriction could also be applied to charge of prostitution cases. If the charge is well grounded it would seem that the necessary mental anguish could not result. Therefore, there is a good possibility that the courts will by implication restore the word "falsely" in such cases. Suits for divorce being within the jurisdiction of the court of equity, the "clean hands" doctrine is likely to prevent the decree unless the charge of prostitution is actually falsely made. The legislature should consider restoration of the word "falsely" to the provision dealing with a charge of prostitution.

The second clause of subsection (d) is completely new. However, its intended result may not be completely new. From the earliest divorce cases it has been held that such conduct and acts by one spouse toward the other as produce reasonable apprehension of personal violence or produce mental anguish, distress and sorrow and render cohabitation miserable, impairing, or likely to impair, health or health of mind, are cruel and inhuman treatment constituting a ground for divorce in West Virginia. *Smith v. Smith*, 138 W. Va. 388, 76 S.E.2d 253 (1953); *Arnold v. Arnold*, 112 W. Va. 481, 164 S.E. 850 (1932); *White v. White*, *supra*; *Goff v. Goff*, 60 W. Va. 9, 53 S.E. 769 (1906).

A few years later the courts began to define cruelty as "personal violence or other acts tending to break down the health and happiness of the offended spouse." *Lord v. Lord*, 80 W. Va. 547, 92 S.E. 749 (1917). It has been pointed out that in such cases it is extremely doubtful that the term "happiness" adds anything to the

test because in mentioning happiness the court requires that both health and happiness be endangered. Colson, *West Virginia Divorce Law*, 43 W. VA. L. REV. 298 (1937). This view has been followed or referred to favorably in several other cases. *Smith v. Smith*, *supra*; *Settle v. Settle*, 117 W. Va. 476, 185 S.E. 859 (1936); *Smailes v. Smailes*, 114 W. Va. 374, 171 S.E. 885 (1933); *Schutte v. Schutte*, 90 W. Va. 787, 111 S.E. 840 (1922).

Essentially, the only difference between the second clause of the amended version of subsection (d) and the prior case law is that the words "is such as to destroy or tend to destroy" have been substituted for "tending to break down". In context, both phrases convey the idea of deterioration of health resulting from this cruel treatment. Therefore, it is extremely doubtful that any appreciable changes will result from this addition to the prior statutory provision.

It has long been established that the test of continued cohabitation is whether under all the facts proven the plaintiff can with safety to person and health continue to live with the defendant. *Davis v. Davis*, 137 W. Va. 213, 70 S.E.2d 889 (1952); *Maxwell v. Maxwell*, *supra*. This same test has been carried over in the amendment.

As before pointed out, the term "happiness" has been linked to "health" so that impairment of both, but not of "happiness" alone, is required as grounds for divorce. *Schutte v. Schutte*, *supra*. In the amended provision the words "happiness and welfare of the other . . ." are used. Therefore, it seems that the legislature is still requiring more than mere impairment of happiness as a ground for divorce. It seems logical that had the legislature intended to make unhappiness alone ground for divorce that it would have done so specifically in light of past case law on the subject. Probably the consensus of opinion is adequately stated by saying that there must be a sufficient showing that the health of the plaintiff was in some way adversely affected by the conduct of the defendant. *Kessel v. Kessel*, 131 W. Va. 239, 46 S.E.2d 792 (1948).

In light of these observations, it is very doubtful that the amendment has done a great deal toward making prior divorce law more lax. Certainly the reduction in the desertion period is a more lenient policy. As to the cruelty provision, however, there is room

for doubt. It would appear that existing case law has adequately covered these provisions, but as in the case of all statutes the ultimate determinations lie with the courts.

J. C. W., Jr.

ABSTRACTS OF RECENT CASES

CONSTITUTIONAL LAW.—The supreme court proceeding in mandamus directed *D*, a circuit judge, to authorize the court reporter to furnish to *P*, who had been convicted of murder, a copy of the trial proceedings without charge under a statute providing that a copy of the trial proceedings should be furnished without charge to an indigent person for the purpose of appeal when the court has appointed counsel for such indigent person. W. VA. CODE c. 51, art. 7, § 7 (Michie 1955). *D* contended that the statute did not apply to *P* since he did not have court appointed counsel. *Held*, that the statute favors the class of indigent persons for whom counsel has been appointed in criminal proceedings; and as to indigent persons for whom counsel has not been appointed is violative of the guarantees of due process and equal protection provided for in the fourteenth amendment and the Constitution of West Virginia. *Linger v. Jennings*, 99 S.E.2d 740 (W. Va. 1957).

This case points out that even though in this state a defendant in a criminal proceeding is not, as a matter of right, entitled to a writ of error, nevertheless a right to apply for a writ of error is guaranteed by the fourteenth amendment and should not be refused because of the defendant's inability to pay for a transcript for such purpose. The court followed *Griffin v. Illinois*, 351 U.S. 12 (1956), which is fully treated in Comment, 59 W. VA. L. REV. 79 (1956).

J. E. J.

EASEMENTS—PRESCRIPTIVE RIGHT.—*P* brought suit to compel *D* to remove two gates placed across a private road leading from *P*'s adjoining property to a public road, and to restrain *D* from obstructing the road in the future. There was no instrument granting the way nor any contract defining rights of adjoining property owners. Evidence established that *P* had a prescriptive right to use the road although gates and bars had been maintained there for many years. *Held*, reversing the lower court, that a landowner may put